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February 11, 2011

By Electronic Mail and Federal Express

Mr. Jeff S. Jordan
Federal Election Commission
999 E Street NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
2011 FEB 14 AM 11:41
OFFICE OF GENERAL
COUNSEL

Re: *Response to Complaint Against WMUR-TV (MUR 6450)*

Dear Mr. Jordan:

We are submitting this letter on behalf of WMUR-TV ("WMUR") in response to a Complaint filed with the Federal Election Commission ("Commission") by Mr. Kevin Rondeau.

Background

On January 6, 2011, Mr. Rondeau filed a Complaint against WMUR, the New Hampshire Republican Party and Frank Guinta. Mr. Rondeau claims that WMUR "arbitrarily denied equal television broadcast access opportunity for all federal election candidates during a televised Congressional debate." Mr. Rondeau alleges that this "violation" resulted in a "fraudulent election." This response is directed only to the allegations that would be construed against WMUR.

The debate Mr. Rondeau is most likely referring to is a Republican primary debate co-sponsored by WMUR and the *New Hampshire Union Leader*, a local newspaper, that took place on September 8, 2010. Four Republican candidates were selected to participate in the debate: Frank Guinta, Rich Ashooh, Sean Mahoney, and Bob Bestani. The candidates were given an opportunity to present their views in a question-and-answer format led by a moderator and a panel of three journalists.

The selection of candidates to appear in WMUR's debate necessarily involves the exercise of journalistic discretion to determine newsworthiness. Consistent with 11 C.F.R. 110.13 of the Commission's rules, WMUR developed and used pre-established objective criteria to select the candidates for the Republican primary debate.

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The objective criteria required for inclusion in the debate were:

- (1) That the candidate be legally qualified to hold office;
- (2) That a Congressional candidate's campaign committee be registered with the FEC, and that a candidate be qualified for the official ballot (or be conducting a write-in campaign);
- (3) That the campaign be running an active campaign (including fundraising, paid advertising, paid campaign staff, coverage from media outlets, a network of local volunteers, joint appearances with other candidates, and an active campaign website), and
- (4) That at least 10% of potential voters know enough about the candidate to form an opinion of him or her.

Mr. Rondeau does not specifically allege what it was about the debate that purportedly violated federal election law. He does not allege that he asked to be included in the debate, he does not challenge the structure of the debate, and he does not allege any problems with the criteria applied by WMUR. Rather, he appears only to complain that he was excluded from the debate.

Nevertheless, out of an abundance of caution, WMUR construes Mr. Rondeau's complaint as challenging the pre-established, objective criteria used to select the candidates for participation in the debate and implying that WMUR's staging of the debate somehow constituted an unlawful "contribution" or "expenditure" under federal election law.

For the reasons listed below, Mr. Rondeau's complaint lacks merit, and the Commission should take no action against WMUR.

Discussion

Corporations are prohibited by federal law from making any contribution in connection with a Federal election.¹ In light of the Supreme Court's recent decision in *Citizens United v. Federal Election Comm'n*,² corporations are permitted to make independent "expenditures" in connection with a federal election that are not coordinated with a candidate. The law defines an "expenditure" to include any "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."³

¹ 2 U.S.C. § 441b.

² 558 U.S. —, —, 130 S.Ct. 876 — L.Ed.2d — (2010).

³ 2 U.S.C. § 431(9)(a).

Although WMUR is constitutionally permitted to make independent expenditures in connection with a federal election, its staging of the debate did not constitute an "expenditure" in the first place. The costs of staging the debate were not made for the purpose of influencing any election for Federal office by favoring one candidate over another candidate because the staging of the debate fell within both the station's legitimate press function and the requirements set forth in 11 C.F.R. § 110.13.

A. The Debate Fell Within The Media Exemption

Although many media entities are corporations, the Commission's ability to regulate and investigate media activities is restricted by the so-called "media" or "press" exemption found in 2 U.S.C. § 431(9)(B)(i).

The media exemption excludes the cost of any "news story, commentary, or editorial distributed through the facilities of any broadcasting station" from the definition of contribution or expenditure.⁴ A federal district court held in *Readers Digest Ass'n, Inc. v. FEC* that the Commission was barred from investigating the activities of a media organization unless and until the press exemption is determined to be inapplicable:

Freedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with dissemination of political matter. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the press exemption.⁵

The media exemption applies where (1) the entity is not owned or operated by a political party, candidate, or political committee, and (2) the entity is operating within its "legitimate press function."⁶ Both prongs are met here. WMUR-TV is owned by Hearst Properties Inc. and is not owned or controlled by a political party, political committee or candidate.⁷ The station's staging of a Congressional debate is clearly a "news story" within the meaning of the media exemption in that the debate was a component of WMUR's newsgathering activities—and its public affairs programming in particular—designed to inform viewers of the issues and

⁴ See 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. 100.73, and 100.132.

⁵ 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981).

⁶ See *Readers Digest*, 509 F. Supp. at 1214.

⁷ See Declaration of Alisha McDevitt ("McDevitt Decl.") at ¶ 2.

candidates in the Republican Congressional primary.⁸ Indeed, a television station is encouraged to present such debates and other political and public affairs programming by the Federal Communications Commission as part of its public interest stewardship.⁹

For these same reasons, the debate easily satisfies the Commission's rules applying the media exemption to a "bona fide news account" that is "part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates."¹⁰

B. The Debate Fell Within The Debate Exemption

Even without the protection of the media exemption generally, the costs of staging the debate are nonetheless exempt from the prohibition on corporate contributions or expenditures if the broadcaster complies with the rules under 11 C.F.R. § 110.13.¹¹

Section 110.13 expressly permits broadcasters to stage debates, provided that (1) the broadcaster is not owned or controlled by a political party, political committee or candidate, (2) the debates include at least two candidates, and (3) the debate is not structured to promote or advance one candidate over another.¹² The staging organization must use pre-established

⁸ See MUR 5224 (Boston Globe) (a "news organization's presentation of a candidate debate is a 'news story' within the meaning of this provisions of the FECA") (Statement of Reasons by Chairman Mason, Vice-Chairman Sandstrom, and Commissioners Smith and Toner); See also MUR 5110, 5162.

⁹ Although Section 315(a) of the Communications Act requires that television licensees provide equal opportunities for all legally qualified candidates to use its broadcast facilities, debates are excluded from that rule as "bona fide news interviews" or "on-the-spot coverage of bona fide news events." See 47 U.S.C. § 315(a)(2) and (4); see *Henry Geller*, 95 F.C.C.2d 1236, *aff'd sub nom. League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C.Cir.1984). And it is well-settled that there is no private right of action under Section 315 of the Communications Act by a candidate who has been excluded from a debate broadcast by a television station (whether public or private). See, e.g., *McCarthy v. National Broadcasting Co.*, No. 96-7822, 162 F.3d 1148, *3 (2d Cir. 1998); *Lechtner v. Brownyard*, 679 F.2d 322, 326-27 (3rd Cir. 1982); *Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397, 401 (5th Cir. 1980); *Daly v. Columbia Broadcasting System, Inc.*, 309 F.2d 83, 85 (7th Cir. 1962); *Palmer v. Fox Broadcasting Corp.*, No. CIV.A. 02-0108, 2002 WL 31027440, *1 (E.D. La. Jan. 15, 2002); *Arons v. Donovan*, 882 F. Supp. 379, 385, 391 (D. N.J. 1995); *Lamb v. Griffin Television, Inc.*, 804 F. Supp. 1430, 1431 (W.D. Okla. 1992).

¹⁰ See 11 C.F.R. 100.73, 100.132.

¹¹ See also 11 C.F.R. §§ 100.92, 100.154.

¹² 11 C.F.R. §§ 100.92 (debates that comply with 11 C.F.R. § 110.13 are exempt from definition of "contribution"); §§ 100.93 (same for "expenditure").

objective criteria to determine which candidate may participate in a debate.¹³ The Commission has afforded media entities wide latitude in developing objective criteria, noting that “the choice of which objective criteria to use is largely left to the discretion of the staging organizations.”¹⁴

WMUR staged its debate wholly in accordance with the Commission’s rules. There is no complaint about the structure of the debate¹⁵—only the exclusion of Mr. Rondeau. And, as described in the attached Declaration of Alisha McDevitt, the station developed objective criteria prior to the debate and then used the criteria to determine which candidates to invite to participate in the debate. The criteria were designed to assure that the public had a chance to hear from, and consider, the candidates whose campaigns had generated enough support and interest to have an impact on the election.

Mr. Rondeau failed to meet many, if not all, of the required objective criteria—save for the threshold requirement that he be a legally qualified candidate. Below are some examples drawn from Ms. McDevitt’s declaration:

- * The criteria required that an independent poll show that at least 10 percent of potential voters knew enough about Mr. Rondeau to form an opinion of him. The 10 percent *name recognition* threshold is far more generous than 10 percent *support* for a candidate, yet Mr. Rondeau failed even to make this showing of 10 percent name recognition. The independent poll conducted by the University of New Hampshire prior to the debate showed that only 8% had any opinion of Mr. Rondeau at all.
- * The criteria required that Congressional candidates register their campaigns with the Commission. Mr. Rondeau did not do so.¹⁶ The lack of registration shows more than just a lack of a credible campaign organization—it also reveals

¹³ 11 C.F.R. § 110.19(c).

¹⁴ 60 Fed. Reg. 64260, 64262 (Dec. 14, 1995).

¹⁵ McDevitt’s declaration nevertheless confirms that the station structure the debate to give each candidate an equal opportunity to answer the same question and to present a closing statement. McDevitt Decl. at ¶ 12.

¹⁶ McDevitt Decl. at ¶ 8. In addition, a current search of the Commission’s website similarly confirms that no results for “Rondeau” under the “Candidate/PAC” appear in the search results for the 2009-2010 cycle.

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that Mr. Rondeau did not receive aggregate contributions or aggregate expenditures totaling more than \$5,000.¹⁷

- * The criteria required that the candidate be running an "active campaign" with fundraising, paid staff, networks of volunteers, and media coverage. To the best of WMUR's knowledge prior to the debate, Mr. Rondeau did not have, among other things, sufficient fundraising, paid advertising, paid staff, or a network of local campaign organizations. He generated little if any media attention and WMUR received no notice of any campaign events.

Given that Mr. Rondeau met only one of the four pre-established objective criteria, WMUR was well within its discretion to not include Mr. Rondeau in the debate.

Because WMUR's staging of the Republican primary debate (1) was a "news story" that was exempt from the definition of contribution or expenditure, and (2) complied with the exemption for candidate debates in 11 CFR § 110.13, there is no reason to believe that WMUR-TV violated the prohibition on contributions and expenditures in connection with a Federal election under 2 U.S.C. § 441b (or violated the Communications Act of 1934 or any other law in connection with the debate at issue). Accordingly, the Commission should take no action against WMUR.¹⁸

If you have any questions or need any additional information, please do not hesitate to contact either of the undersigned at (919) 839-0300.

Respectfully submitted,



Mark J. Prak
Charles F. Marshall

Attachment

¹⁷ See 11 C.F.R. § 100.3 (defining Federal candidate as one who receives \$5,000 in contributions or expenditures during an election cycle).

¹⁸ For these reasons, it is not necessary for the Commission to determine whether the costs of staging the debate constituted a lawful, independent "expenditure" in connection with a federal election under *Citizens United*. In the event the Commission determined that neither the media exemption nor the debate exemption was applicable here, WMUR respectfully reserves the opportunity to argue, among other things, that any such unintended "expenditure" was an independent expenditure permitted by the Supreme Court's decision.

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